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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 596

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON,
Petitioner,

against

MERRITT-CHAPMAN & SCOTT CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM L. LYNCH,
Attorney for the Respondent,
52 Wall Street,
New York 5, N. Y.

JAMES W. LAMBERTON,
ALAN APPELBAUM,
Of Counsel.

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Opinions Below

The opinion of the District Court (App. A to Petition, pp. 1a-12a) is reported at 207 F. Supp. 443. The opinions of the Court of Appeals, including the original opinion (*id.*, pp. 13a-52a) and the opinions on the petition for rehearing (*id.*, pp. 53a-57a) are reported at 319 F. 2d 94. The order denying the petition for a rehearing *in banc* (*id.*, p. 58a) is unreported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

In a diversity action, the Court of Appeals interpreted New York practice statutes relating to provisional remedies available to New York creditors. The only question presented here, and the only ground on which a writ of certiorari is sought, is whether the decision below constitutes a reasonable and permissible interpretation of New York law.

Statutes Involved

The pertinent provisions of New York Civil Practice Act §§902 and 903 (pursuant to which the writ of attachment was issued) are set out in Appendix A, *infra*, at p. A-1. The pertinent provisions of New York Civil Practice Act §912 (pursuant to which the levy of attachment was made) are set out in Appendix B to the Petition, p. 59a.

Statement

Respondent Merritt-Chapman & Scott Corporation (M-C&S) is a Delaware corporation whose principal place of business is in New York, New York (JA 19a).* Petitioner Public Utility District No. 2 of Grant County, Washington (District) is a municipal corporation formed under the statutes of Washington and empowered for all corporate purposes, including the construction of facilities to furnish its inhabitants and others with electric power and the right to sue and be sued (App. A to Petition, pp. 15a-16a).

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* The Joint Appendix submitted to the Court of Appeals and filed with this Court is herein referred to as JA.

On July 9, 1956, M-C&S entered into a contract with the District in New York, New York for the construction of a hydroelectric dam and power plant on the Columbia River known as the Priest Rapids Project (JA 4a-5a). The contract established a construction period that called for completion by M-C&S of the Priest Rapids Project by October, 1961 (JA 118a), and M-C&S was required to supply the District with a performance bond of $45.9 million to protect the District against costs and damages in the event that M-C&S should fail to comply with the terms of its contract (JA 24a). The contract required the District's own engineers to issue a completion certificate when M-C&S's work under the contract was, after inspection, found to be complete and acceptable (JA 23a-24a).

In order to finance the Priest Rapids Project, the District issued $166,000,000 face value of revenue bonds, and funds from the sale of bonds sufficient for payment of the cost of acquisition and construction of the Project were deposited with Bankers Trust Company, New York, New York (JA 91a).

On September 28, 1961 the District's construction engineers, after the inspection called for by the contract, certified to the District that construction of the dam by M-C&S was completed and its work acceptable (JA 26a-27a, 33a-34a). Despite the completion certificate from its engineers, the District refused to make payments amounting to more than $10,000,000 due and owing to M-C&S consisting of retained percentages and bonus payments then due under the contract (*ibid.*). The dam is in full commercial operation by the District (JA 69a).*

* The record before the district court, filed in the spring of 1962, shows that the Priest Rapids dam was scheduled by the District for formal dedication by the Secretary of Commerce on June 2, 1962 (JA 72a).

When the District refused to pay over the funds claimed by M-C&S to be due on completion of construction, M-C&S filed suit against the District in the Supreme Court of the State of New York, County of New York, to recover the sum of $17,391,012 (JA 4a-17a). On March 7, 1962, the New York Supreme Court issued a warrant of attachment against funds of the District in New York (JA 39a-40a), and a levy was made thereunder on the construction funds on deposit at Bankers Trust Company, New York, New York, that were allegedly the property of the District (JA 68a). Subsequently, the summons and verified complaint were personally served upon the District in the State of Washington (*ibid.*).

On March 26, 1962, the District removed the action from the New York Supreme Court to the United States District Court for the Southern District of New York (JA 41a-43a). Prior to answering on the merits, the District moved to vacate the warrant of attachment and the levy thereunder and to set aside the service of summons (JA 44a).

The District's motion was based upon two grounds: (a) the District was a political subdivision of the State of Washington whose property was immune from attachment; and (b) the District's funds on deposit with Bankers Trust Company were trust funds and not property of the District subject to attachment (App. A to Petition, pp. 4a-5a). The district court determined the first issue in the District's favor and, therefore, found it unnecessary to decide the second issue, *i.e.*, the trust status of the funds (*id.*, p. 12a).

On appeal to the United States Court of Appeals for the Second Circuit, that court held, after an extensive review of New York statutory and case law:

> "• • • in this particular *quasi-in-rem* proceeding the levy upon the funds of the District on deposit with Bankers Trust Company should be set aside and the funds deemed immune from attachment only if permitting such levy to remain in force would substantially interfere with the fulfillment by the District of its essential public functions" (Appendix A to Petition, p. 32a).

The court then remanded the case to the district court for further hearings and proof (*id.*, p. 52a).

To guide the district court, the court below set down general rules as well as specific rules applicable to the facts of this case. Generally, the court noted the probability of substantial interference in the case of a levy either upon funds set aside by a municipal corporation to meet general governmental responsibilities or upon funds set aside for specific governmental functions unrelated to the attaching creditor's claim (*id.*, p. 48a). The court noted, however, that a levy upon specific funds set aside to meet a particular obligation owed to a particular creditor who had totally performed his own obligations would not, in the absence of further proof, be automatically considered as constituting substantial interference (*id.*, pp. 48a-49a).

The court then applied these general principles to the record before it, noting *inter alia* that an attachment levy "at any point prior to completion of the power features of the Project" would have had such adverse effects upon the District's performance of its public duties that a New York court would almost certainly have vacated the levy (*id.*, p. 50a). In remanding the case to the district court for further factual hearings and consideration in the light of its opinion, the court below stated its belief that "the interests of justice require that the initial decision should

be made below" (*id.*, p. 33a). The court below also directed the district court to determine the trust feature of the litigation, *i.e.*, whether the funds held by Bankers Trust Company are trust funds and, therefore, not property of the District subject to attachment and levy (*ibid.*), a legal issue that will be dispositive of the case if decided in the District's favor.

I.

The decision below constitutes a correct formulation of applicable New York law.

A. The Court of Appeals ruling that New York law governed the decision is not an issue.

The Court of Appeals noted at the outset of its opinion that:

> "* * * the first question for our consideration is the existence and nature of the limitation the New York courts would read into the attachment provisions of the New York Civil Practice Act, Sections 902, 903 and 912, based upon the District's claim of governmental immunity" (Appendix A to Petition, p. 29a).

The sole question presented by the present petition is whether the decision below, applying the federal doctrine of *Erie R. R.* v. *Tompkins*, 304 U. S. 64 (1938), is so in conflict with applicable state law that this Court should review the questions of New York procedure involved in the case.

B. The decision below was correct and would have been reached by the New York courts.

The Court of Appeals in the present case was required to decide a question of New York law without the guidance

of decisions by New York's highest court on the applicability of the relevant provisions of the New York Civil Practice Act to suits against foreign municipal corporations. It would be inconsistent with the orderly development of New York law for the Supreme Court of the United States to decide this technical point of New York procedure before the Court of Appeals of the State of New York has spoken. The sole question in this case at this preliminary stage is one which this Court should not review since it represents "the considered determination of [a] question * * * of state law by * * * [an] intermediate federal appellate court * * *", a court which should be regarded as expert as to the laws of the states within its circuit, see *Huddleston* v. *Dwyer*, 322 U. S. 232, 237 (1944); *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 707-8 (1949). This is particularly true here where the opinion is by a judge whose statement of New York law should be given "special weight" not only because he is from the New York bar but because he taught other New York lawyers for many years, see *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 204 (1956).

In spite of the recognized position of the court below as a qualified exponent of New York law, the District, in attempting to escape liability to suit in the New York courts, would have this Court believe that a state court would have inquired only whether the District's activities were "governmental" or "proprietary" and, if it determined that they were "governmental", would have vacated the levy and set aside service. It is, however, clear that reliance on the governmental-proprietary doctrine, particularly in a case of this kind, would serve no useful purpose and that the court below quite properly brushed aside verbalisms in arriving at its conclusion.

In fact, the decision of the court below was soundly based on New York precedent and represents a contemporary reformulation of the New York rule relating to the application of New York provisional remedies to foreign municipal corporations. Three New York cases have dealt specifically with the matters at issue here, *i.e.*, *Doyle* v. *City of Astoria, Or.*, 147 Misc. 127, 262 N. Y. Supp. 572 (Sup. Ct. N. Y. Co. 1932), *aff'd without opinion*, 238 App. Div. 833, 262 N. Y. Supp. 973 (1st Dep't 1933); *Harman* v. *City of Ft. Lauderdale*, 134 Misc. 133, 234 N. Y. Supp. 196 (Sup. Ct. N. Y. Co. 1929) and *Van Horn* v. *Kittitas County, Wash.*, 28 Misc. 333, 59 N. Y. Supp. 883 (Sup. Ct. N. Y. Co. 1899), *aff'd on opinion below*, 46 App. Div. 623, 61 N. Y. Supp. 1150 (1st Dep't 1899).

In *Doyle*, the plaintiff sued to recover unpaid interest on bonds of the defendant city and levied under a warrant of attachment against money that the defendant had deposited with a New York bank. The City of Astoria's motion to vacate the warrant and the levy thereunder was rejected by the court which stated:

> "A foreign municipal corporation under ordinary circumstances will be treated like any other corporation, and the court will take jurisdiction."

Similarly, in *Harman*, the plaintiff levied upon property of the defendant Broward County Port Authority, a municipal corporation organized under the laws of Florida. The defendant moved to vacate the warrant on the grounds that the court had no jurisdiction since the defendant was a foreign municipal corporation performing public functions and that the levy was invalid because the funds of the defendant in New York were funds of a municipality held for public purposes. In upholding the

warrant of attachment and the levy thereunder, the court rejected both arguments.

In *Van Horn*, the creditor plaintiff secured a writ of attachment against the defendant, a Washington county, and levied upon money of the defendant, deposited in a New York bank, which had been appropriated by the defendant to the payment of interest on its bonds. The defendant moved to vacate the warrant of attachment and, in the alternative, the levy thereunder. The court upheld the issuance of the warrant of attachment, stating that the defendant municipality was subject to suit in New York and that plaintiff could avail itself of the provisional remedies of New York statute; but it vacated the levy on the primary ground that the money deposited in New York "was appropriated for a specific purpose, inconsistent with its use for the discharge of the plaintiff's claim."

When *Doyle*, *Harman* and *Van Horn* are re-examined, it becomes clear that the decisions in those cases are consistent with the rule that a levy may stand unless it will interfere with the performance of the defendant's public duties—in *Van Horn*, a levy would have interfered with "payment of the interest on the outstanding bonds of said county", but in *Harman* the levy would interfere only with activities found by the court to be "in the nature of a private business enterprise engaged in with the hope of revenue" and in *Doyle* the court noted that the city had not proved "that the attachment levied by the plaintiff prevented the municipality from continuing to function". They do not support reliance on the anachronistic governmental-proprietary distinction since, as the opinion below demonstrates, the activities of the defendants in *Doyle* and *Harman*, in the light of subsequent New York

cases, are no less "governmental" than the activities of the District.

Indeed, applying the principles of the *Doyle*, *Harman* and *Van Horn* cases, the decision below is more favorable to the District than those cases would require. In all three, the warrants of attachment were upheld; and the levy was permitted to stand in all but *Van Horn*, where the fund was found to be appropriated for a specific purpose inconsistent with its use to pay plaintiff. Thus, the court below would have been warranted in formulating the "New York rule" as permitting a levy upon the funds of a foreign municipal corporation in New York whenever the fund in question was not specifically appropriated for an inconsistent purpose. In permitting a levy only if it would not substantially interfere with performance of the corporation's essential public functions, the court below granted the District greater protection than it might have received under a rigorous application of the three New York cases directly in point.

But even accepting the District's argument that the New York cases in point tend to a "rule" that there may be no attachment and levy against a municipal corporation acting in its "governmental" capacity, federal courts need not mechanically apply the language of trial courts. See *King* v. *Order of United Commercial Travelers*, 333 U. S. 153 (1948). Therefore, the Court of Appeals considered, in addition, a number of other relevant factors in determining what a New York court would do today and arrived at a reasonable and permissible result. In so doing, the Court of Appeals followed orthodox *Erie-Tompkins* doctrine. *Strubbe* v. *Sonnenschein*, 299 F. 2d 185 (2d Cir. 1962); *Summers* v. *Wallace Hospital*, 276 F. 2d 831 (9th Cir. 1960); see also *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 205 (1956).

The District seeks to strengthen its assertion that the Court of Appeals decision is in conflict with applicable New York law by citing several New York cases holding that governmental property of *New York* municipal corporations is exempt from levy of execution in the absence of an express statute permitting such execution. Nowhere, however, as the District cited any case or statute, and we have not been able to find any, where the New York courts or legislature have stated any general rule that the funds in New York of a *foreign* municipal corporation are exempt from New York remedial statutes relating to attachment and levy of execution. Thus, the essential connecting link between the cases cited by the District and this case is absent. Indeed, as we have shown above, there are decisions by New York courts holding that, in the case of foreign municipal corporations, there is no such general principle. See the *Doyle, Harman* and *Van Horn* cases, *supra*.

A New York court would not be concerned with any remedial limitations established by the internal policy of the State of Washington which authorized the creation of the District and waived its immunity from suit. As stated in *Mertz v. Mertz*, 271 N. Y. 466, 473, 3 N. E. 2d 597, 599-600 (1936):

> "The law of the forum determines the jurisdiction of the courts, the capacity of parties to sue or to be sued, the remedies which are available to suitors and the procedure of the courts. . . . Our courts are not concerned with the internal policy of the State which created the cause of action. They are concerned solely with the law of this State which determines the jurisdiction of its courts and the remedies that may be accorded here."

The major fallacy of the District's attack on the decision below is that it has ignored the factual context of that decision. The court below was careful to point out that upon the record before it, it was faced with the following situation:

> "Construction of the dam has been completed and the Project is now in active operation. The very funds now levied upon were specifically set aside for payments to contractors and others" (Appendix A to Petition, p. 43a).

If M-C&S's obligations have been completed and if the District has set aside a fund for the payment of such obligations on their completion, an attachment by M-C&S can result in no prejudice to the District. In these circumstances, *and they are the circumstances disclosed by this record*, there can be no interference with the public duties of the District but only with its ability to insulate itself from the payment of its just debts. We submit that the District ought to be held at least to minimum standards of commercial morality.

The District seeks to avoid the inevitable conclusions to be drawn from this record by claiming (Petition, p. 15, fn. 5) that the assumption of completion of the project in the decision below, based on uncontradicted affidavits, is unwarranted. But normally this Court "do[es] not grant a certiorari to review evidence and discuss specific facts", *United States* v. *Johnston*, 268 U. S. 220, 227 (1925), and no reason exists here for review of the Court of Appeals' view of the facts. In any event, the District will have ample opportunity to contest M-C&S's version of the facts in the district court to which the case has been remanded, and the district court will have an equal opportunity to evaluate the worth and the relevance, if any, of the District's defenses.

The Court of Appeals' refusal to be blinded by verbal tags is in line with a wealth of precedent. Increasingly, courts have drawn the line between activities of a municipal corporation for which it is liable for suit and those for which it is exempt from suit by examining the effects of the suit. Thus, a municipality may generally not be sued on causes of action arising out of activities supported by taxation since a judgment in these circumstances might well result in an imposition on taxpayers and on tax revenues. On the other hand, suits are generally permitted against municipalities arising out of activities supported by a charge to the users of a service since liability arising out of such activities permits the burden of recovery to be borne, through an adjustment of charges, by the users of the service. See Note, *The Applicability of Sovereign Immunity to Independent Public Authorities*, 74 Harv. L. Rev. 714, 716-717 (1961). In this case, of course, the District's revenues arise from sales of power (in large part to private utilities outside of the District's boundaries), the charges for which are adjusted annually to take into account the District's costs (JA 82a). Thus, under accepted contemporary doctrine, the foregoing suit should be permitted.

C. The Court of Appeals established a practical and workable test.

The District argues that the rule laid down by the Court of Appeals is "unworkable". This assertion is apparently based upon the notion that the district court will be ill suited to determine whether the effect of M-C&S's levy "will be to substantially interfere with the public duties of [the District]". The assertion is demonstrably erroneous. The Court of Appeals set down both general and specific guidelines to assist the district court on

remand; these guidelines do not include the necessity to control the discretion of the District or to examine into the details of every District estimate and expenditure, as the District seems to believe.

The District apparently foresees that the district court will have serious difficulties in determining such questions of fact as:

> a. Is the project completed;
>
> b. What claims can be expected from persons other than M-C&S; and
>
> c. What is the effect of preventing the attached funds from moving to the Reserve Account in the Bond Fund?

These questions are not so complicated or difficult of determination as the District would have this Court believe. The contract between the District and M-C&S provides a clear and concise method of determination of completion of the project—the certificate of the District's own engineers. The burden of proof on the issue of completion is on M-C&S; it is a burden which M-C&S is fully prepared to meet.

With respect to claims from persons other than M-C&S, the District is protected from any unknown claims against funds set aside for construction by the provisions of Rev. Code Wash. §60.28.010, which require the District to withhold certain funds until thirty days after final acceptance of the work as completed and which require subcontractors, in order to secure a statutory lien against the District, to file a statutory notice of claim of lien within that thirty-day period. Thus, after the thirty-day statutory period, which may have run over two years ago because of the filing of the completion certificate by the

District's engineers,* the District will be insulated from claims of other persons arising out of the construction of the dam.

The District's third argument, based on the necessity of the determination of proper reserves to be set up against contingencies, is as illusory as its first two. M-C&S has levied upon the District's construction funds which must be used either for construction payments or, to the extent that the funds are not required for such purposes, for early retirement of its revenue bonds (App. A to Petition, pp. 23a-25a). Indeed, the District has already established, and is compelled to maintain, contingency reserves under its bond resolution, and these contingency reserves are not at issue in this suit.

The District's reliance upon *East St. Louis* v. *United States ex. rel. Zebley*, 110 U. S. 321 (1884), is misplaced. An analysis of that case reveals that what this Court did was to compel present and future payments to the plaintiff from tax revenues earmarked for payment of plaintiff's claim, while limiting the plaintiff's claim to unappropriated general tax revenues to actual surplus funds. In this case, M-C&S is also seeking to compel payment from a fund specifically established for the purpose of making such payments, the very thing permitted by this Court in the *East St. Louis* case.

D. There is no warrant for review by this Court at this preliminary stage of the litigation.

This case was decided by the district court on a motion to vacate a warrant of attachment and set aside the

* The acceptance of the work as completed by the District's engineers is binding upon the District. *See Wheeler, Osgood Co.* v. *Fidelity & Deposit Co.*, 78 Wash. 328, 139 P. 53 (1914); see also *H. M. Hughes Co.* v. *Sapphire Realty Co.*, 11 N. Y. 2d 17, 181 N.E. 2d 407 (1962).

levy thereunder and the service of summons. The district court did not deal with or decide the second major legal argument advanced by the District, *i.e.*, that its funds are trust funds and not property subject to attachment. Similarly, the Court of Appeals did not decide the trust issue but directed the district court to consider it, if necessary, upon the remand.

However, prior to any consideration of the trust issue, the Court of Appeals directed that there be further factual hearings in order to clarify the admittedly incomplete state of the paper record. In these circumstances, with both dispositive legal and factual findings as yet unmade by any court, it is premature for this Court to pass on the decision below. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U. S. 372, 384 (1893).

II.

The District vastly overstates the importance of the precedent established by the Court below.

The court below recognized that "no case seems to have arisen presenting the special factual situation now before us * * *" (App. A to Petition, p. 54a). Nevertheless, the District has attempted to escape this unique factual context and to give an unwarranted importance to the decision below by an erroneous argument, based largely upon facts outside of the record relating to bond issues involving construction funds underwritten in New York for out-of-state governmental instrumentalities.* With-

* It is noteworthy that the District does not enumerate which of the construction projects, financed by bonds underwritten in New

out case or factual support, the District alleges that the decision

> "affects the integrity of every such construction fund and any other New York deposit of sister state instrumentalities; jeopardizes every governmental instrumentality that may have sold such bonds in the immediate past, and complicates the problem of any such instrumentality that may in the future contemplate recourse to the New York market or that may have other needs for keeping funds in New York" (Petition, p. 21).

The District errs; this case could be used as precedent for the proposition that funds of out-of-state municipal corporations held by New York banks are subject to levy only when a plaintiff can meet certain rigorous standards. First, the plaintiff would have to demonstrate that the transaction fell within New York CPLR §6201 (the successor to New York Civil Practice Act §§902 and 903). Secondly, even a New York resident plaintiff could invoke jurisdiction over a nondomiciliary defendant under New York CPLR §302 only in certain restricted circumstances, including the transaction of business by the defendant in New York State, the commission by the defendant of a tortious act in New York State or the ownership, use or possession by the defendant of real property within New York State. Third, under New York Business Corporation Law §1314(b), a foreign corporation such as M-C&S

York, also involved *construction contracts made in New York*. It is also noteworthy that the amount of such issues involving construction funds will be reduced by over $1.3 billion, or approximately 75% of the figure furnished by the District in Appendix C to its Petition, if the issues five or more years old are eliminated; if Puerto Rican bonds "issued at various times during period 1947/63" (App. C to Petition, p. 70a) are excluded, the reduction is approximately $1.6 billion and 88%. Surely most construction funds will be paid out within five years after flotation of the issue.

could bring an action against a foreign municipal corporation only in even more limited circumstances, including the situation involved here, namely, an action for damages for the breach of a contract made within New York State. Finally, a foreign municipal corporation's funds in New York could not be levied upon in any circumstances if such a levy would substantially interfere with the performance by the foreign municipal corporation of its public duties.

Thus, the court below did not declare an open season for general creditors of the District or of any other foreign municipal corporation. The court held only that under New York statutory and case law the funds of a foreign municipal corporation, which has entered into a construction contract in New York and deposited funds in New York for the payment of its obligations thereunder, are subject to levy by the other party to the contract after the latter has completed its contractual performance, but only if such levy would not interfere with the defendant's public duties. To hold a foreign municipal corporation to such minimum legal standards in such carefully controlled circumstances could not possibly have the drastic and far-reaching consequences feared by the District.

Similarly, there is no warrant for the District's fear that the Court of Appeals decision will, by funneling business into the federal court, prevent the courts of New York from expressing themselves on the issues. The District's argument assumes that which it has failed to prove, namely, that there is a variance between the Court of Appeals' decision and New York law. The District also ignores the many considerations (*e.g.*, more limited discovery procedures, broader appellate review) that influence New York plaintiffs to use New York State courts.

But even in the highly unlikely event that New York State courts are not called upon to decide this and similar issues in the future, the remedy for other foreign municipal corporations is close at hand. The District has already interested the Attorney General of the State of New York in its cause. If the consequences feared by the District ensue, certainly the Attorney General can bring the statutory interpretation of the court below to the attention of the New York Legislature which has the power to modify, if it so desires, the terms of the statutes under consideration in this case. As stated in Devlin, *Samples of Lawmaking*, p. 22 (1962):

> "Statute is a more powerful and flexible instrument for the alteration of the law than any that a judge can wield. Its stretch is unlimited; it can overturn existing law, extend an old principle to any distance or reach out for a new one."

The District's final argument, set out in its conclusion, is that it should not be compelled to defend an action in New York. The quick answer to this assertion is that, so long as it enters into contracts in New York and deposits funds in New York for payment of its obligations under such contracts, it must be prepared to face this risk. The District should not be allowed to seek a change of venue under the guise of a motion to vacate an attachment. If the venue question is presented, M-C&S is prepared to prove, among other items, that its records and personnel necessary for a trial of this case have long been moved from the construction site in Washington to its other offices. The district court can then determine this question on the basis of evidence, not speculation. In any event, the question is not properly before this Court at this time.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: November 25, 1963.

Respectfully submitted.

WILLIAM L. LYNCH,
Attorney for the Respondent,
52 Wall Street,
New York 5, New York.

JAMES W. LAMBERTON,
ALAN APPELBAUM,
Of Counsel.

APPENDIX 1

New York Civil Practice Act:

§902. *In what actions attachment of property may be had.* A warrant of attachment against the property of one or more defendants may be granted upon the application of the plaintiff, as specified in the next section, in any action for the recovery of a sum of money only. (N. Y. Sess. Laws 1920, C. 925, §902, as amended N. Y. Sess. Laws 1941, C. 253)

§903. *What must be shown to procure warrant of attachment.* To entitle the plaintiff to such a warrant, he must show that a cause of action specified in the last section exists against the defendant, and, if the action is to recover damages for breach of contract, that the plaintiff is entitled to recover a stated sum, over and above all counterclaims known to him. He must also show that the defendant

1. Is either a foreign corporation or not a resident of the state; * * * (N. Y. Sess. Laws 1920, C. 925, §903, as amended N. Y. Sess. Laws 1941, C. 253)